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## International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime

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## **Abstract**

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**KEYWORDS:** international, crime, Western

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## I. INTRODUCTION: THE NEED FOR INTERNATIONAL COOPERATION

### A. *International Aspects of Crime*

Any sophisticated discussion of criminal law is apt to touch on the nature of the criminal process itself. In so doing, questions should arise as to how, when, and why the criminal process punishes someone for engaging in certain types of behavior. Though one will not be able to find unanimous answers to these questions, in most circumstances, asking these questions helps to frame the boundaries of the debate.<sup>1</sup>

That is not to say that the details of this inquiry are readily or easily defined. In fact, such is clearly not the case. Take, for example, illicit drug use and trafficking in the United States, and within that topic focus simply on the role of drug testing in grappling with the drug problem in the public sector. The issues are legion, and rules and regulations are being regularly challenged in court. The litigants are looking for answers to significant constitutional questions. Does the fourth or fifth amendment apply? Is "reasonable suspicion" really an issue any more?<sup>2</sup> The answers to these questions will further define the criminal process in this country.

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1. P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW CASES AND MATERIALS 1-2 (1986).

2. Weeks, *Public Employee Drug Testing under the Fourth and Fifth Amendments: Where Are We Now and Where Are We Going Under the Federal Decisions?*, 20 URB. LAW. 445 (1988).

However, criminal activity does not recognize national boundaries, and to be effective, the criminal process must be flexible enough to deal with this fact. In recent years, Americans have been confounded by the ability of some criminals to manipulate national boundaries to their advantage. How can it be that someone who is wanted for trial in the United States can relax with impunity at his Swiss estate?<sup>3</sup>

The answer is frustratingly simple. Most of the basic institutions which Americans rely on to define and improve the criminal process are nonexistent or extremely limited in the international sphere, for domestic courts and legislatures are, by definition, institutions of limited authority. To cope with the burgeoning international aspects of crime, the institutions we rely on must be adapted to operate in the international arena.

Years ago, Western European countries identified the shortcomings of a domestic approach to international crime and began taking steps to remedy the situation.<sup>4</sup> To illustrate the European approach, this paper focuses primarily on Western European developments in the area of illicit drug use and trafficking. Though progress is being made in other areas, the European approach to illicit drug use and trafficking has produced substantial results in the context of international cooperation; and with America's own "War on Drugs" raging, this subject has particular relevance to the domestic practitioner.

## B. *New Foreign Policy Considerations*

Another reason to examine international cooperation in Western Europe is that we now live in an era in which the territorial state is being eclipsed by non-territorial actors such as multinational corporations, transnational social movements, and intergovernmental organizations. The politics of global interdependence is inescapable.<sup>5</sup>

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3. Copetas, *The Sovereign Republic of Marc Rich*, REGARDIES 47 (Feb. 1990).

4. See Abbell, *Extradition of Business Crimes to and from European Countries*, A.B.A. Panel on International Criminal Cooperation in European Business Crimes in a Rapidly Changing Environment, A.B.A. Nat'l Convention 38, 40 (Aug. 7, 1990). For a discussion of some recent U.S. efforts to cope with international crime, see Weiland, *Congress and the Transnational Crime Problem*, 20 INT'L LAW. 1025 (1986). A summary of some of the international measures in the 1990 Crime Bill can be found at Barber & Zagaris, *Selected International Enforcement Provisions in the 1990 Crime Bill*, 6 INT'L ENFORCEMENT L. REP. 401 (1990).

5. See R. KEOHANE AND J. NYE, *POWER AND INDEPENDENCE WORLD POLITICS IN TRANSITION* 3-4 (1977).

In acknowledgement of this fact, criminal policy has been elevated to one of the priority issues within foreign policy itself. For instance, the declarations emerging from G-7 summits<sup>6</sup> have expanded their scope from economics to terrorism, drugs, and, more recently, money laundering.<sup>7</sup> These criminal problems often arise from international networks operating outside the control of any single sovereign nation. The fluid nature of these networks makes it difficult for a single nation acting independently to combat these criminal problems. In this vein, modern foreign policy increasingly reflects a situation where unilateral displays of force play a diminishing role, for traditional instruments of power cannot deal with these new, more subterranean, threats to international political stability which permeate national boundaries.

In this context, international cooperation represents a valuable new resource in the foreign policy arsenal, offering international solutions to international problems. The section that follows describes one method of facilitating international cooperation via international regimes. If successful, a regime fosters an ongoing cooperative spirit that enhances the participating nations' "soft powers."<sup>8</sup> The term "soft power" describes a nation's ability to persuade another to want what it wants, in contrast to "hard power" which involves one nation ordering another to do what it wants.<sup>9</sup>

In an era of multinational actors and concerns, the ability of nations to exercise co-optive or soft power is becoming increasingly important, for as the mix of resources that define international power change, so too must countries' approach to the acquisition and manipulation of international power. This lesson is especially important to countries which have enjoyed considerable influence from a hard power perspective, such as the United States. These countries must be careful to hone soft powers with the same vigor that they have devoted to hard

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6. The G-7 Summit is an annual meeting of the heads of government of the leading seven industrial nations (the U.S., Italy, France, the U.K., Japan, Canada and Germany). The agenda is predominantly economic. The governments involved prepare the agenda and do a substantial amount of background work. Traditionally, a statement is released at the end of the summits containing agreements on policies reached.

7. See, e.g., Nye, *Soft Power*, 80 FOREIGN POL'Y 153, 164 (1990); Perez, *OAS Opportunities*, 80 FOREIGN POL'Y 51, 55 (1990); see also Sorensen, *Rethinking National Security*, 69 FOREIGN AFF. 1-18 (1990) (discussion of criminal policy in the context of national security redefinition).

8. See Nye, *supra* note 7, at 164.

9. *Id.* at 168.

powers in the past.<sup>10</sup> If they do not, their ability to participate in shaping solutions to current international problems, such as illicit drug use and trafficking, may be compromised. Moreover, due to the important role that international regimes play in developing soft powers, an understanding of regimes is important, if not essential, to nations seeking to shape these solutions.

In order to illustrate the usefulness of international regimes when describing international cooperation in criminal matters, section two defines the term "international regime" and discusses some of the qualities of international regimes. In section three, the Western European regime of cooperation in international criminal matters is outlined, and section four then highlights recent developments and prospects for further developing and defining European cooperation. The article closes with some observations on the impact of the Western European regime of international cooperation both within and without Europe.

## II. INTERNATIONAL REGIMES—A FRAMEWORK FOR COOPERATION

"International regime" is a term from international organization theory that emerged in the early 1970s.<sup>11</sup> The term applies to arrangements that involve mostly government actors, but that affect non-government actors in diverse areas, such as international trade, telecommunications, and meteorology. A regime may be formal, like the General Agreement on Tariffs and Trade, or informal where the regime is merely implicit from the actions of the states involved.

Generally, the purpose of international regimes is to regulate and control certain transnational relations and activities by establishing international procedures, rules, and institutions.<sup>12</sup> In fact, international regimes have been defined as "norms, rules, and procedures agreed to in order to regulate an issue area."<sup>13</sup>

Thus, it is apparent that international regimes are goal-oriented enterprises whose participating members seek benefits through explicit

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10. *Id.* at 171.

11. For an early discussion of "international regimes," see Keohane & Nye, *Transnational Relations and World Politics*, INT'L ORG. 25, No. 3 (1971) (later enlarged and published as a book by Harvard University Press in 1972).

12. R. KEOHANE & J. NYE, *supra* note 5, at 5.

13. Haas, *Why Collaborate? Issue Linkage and International Regimes*, 32 WORLD POL. 357-405 (1980).

or tacit cooperation based on common concerns. In the case of illicit drug use and trafficking, these concerns include: reduction in the supply and demand of illicit narcotics; treatment for persons addicted to narcotics; and diminution of power of the organized narcotics traffickers. Though international regimes often enjoy the sponsorship of intergovernmental organizations (IGOs) like the United Nations, the issues addressed by international regimes are usually more specific in nature. Since the emphasis of a regime is on achieving a specific objective, international regimes are considered to be more flexible in nature and more likely to undergo evolutionary change than IGOs.<sup>14</sup>

If an international regime is successful, it maintains or reduces the cost of legitimate transactions while increasing the costs of illegitimate ones such as money laundering and drug trafficking. In the rapidly changing global marketplace and political scene, a premium is placed on an international regime's ability to meet new developments head-on. This challenge makes it an important function of the international regime to facilitate ongoing negotiations among governments.<sup>15</sup>

In the following section, this article generally outlines the international-regime of cooperation in criminal matters that is emerging in Europe. Typically, there are several approaches used to discuss and describe international regimes. These approaches can range in emphasis between an historical to a functional approach.<sup>16</sup> However, due to space limitations, this article will not follow a particular doctrinal approach in the interest of developing a general and accessible outline of the regime.

### III. THE EUROPEAN REGIME OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

The following discussion is framed in terms of the European Communities and the Council of Europe. These organizations do not completely define the boundaries of the international regime, but they are

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14. W. FELD & R. JORDAN, *INTERNATIONAL ORGANIZATIONS* 40 (1983).

15. For additional background on the importance of international regimes to governmental actors like the United States, see AFTER HEGEMONY, *COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 107 (1984); see also KEOHANE, *The Demand for International Regimes*, in *INTERNATIONAL REGIMES* 141-72 (Keohane ed. 1983).

16. See generally W. FELD & R. JORDAN, *supra* note 14. For an example of the historical approach, focusing on alcohol and narcotics, see Nadelman, *Global Prohibition Regimes*, 44 *INT'L ORG.* 479-526 (1990).

two of the regime's most significant components, and their activities illustrate the general outline of the regime.

Though neither organization specializes in criminal matters, both possess an international institutional framework for the ongoing regulation and control of transnational relations, and both have dealt with international criminal matters. As noted earlier, international regimes are defined by their rules *and* procedures. Therefore, the following discussion describes not only the results of international cooperation in criminal matters, but also the means used to achieve those results.

### A. *The European Communities*

The term "European Communities" refers to the limited federalist system established between Western European countries through treaties of the 1950s.<sup>17</sup> The Communities comprise four main institutions: the Council of Ministers, the Commission, the Parliament, and the Court of Justice. The Council and the Commission bear the primary responsibility for producing legislation.<sup>18</sup> The Commission is responsi-

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17. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty]. "European Communities" refers to three communities that were officially linked in 1967 with the ratification of the merger treaty. The three communities are the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom). J. LOUIS, THE COMMUNITY LEGAL ORDER 9 (1980). Presently, the member states of the European Communities are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom.

18. COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTY YEARS OF COMMUNITY LAW 3 (1983). The three binding acts that the Council and the Commission may issue, regulations, directives, and decisions, are set forth in article 189:

In order to carry out their task the Council and Commission shall in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

EEC Treaty, *supra* note 17, at art. 189; see also OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, TREATIES ESTABLISHING THE EUROPEAN COMMUNI-



ble for preparing the initial legislative proposal, and the Council enacts the legislation into law. In the interim between its proposal and its enactment, the legislation is reviewed by the Council, Commission, and Parliament where opinions and amendments are offered.<sup>19</sup> Once the legislation is enacted, it is binding on the member states, and questions of interpretation are resolved with the assistance of the Court of Justice.<sup>20</sup>

Originally the Community system was quite limited in scope, dealing primarily with the goal of economic integration.<sup>21</sup> However, with the promulgation of the Single European Act in the late 1980s broader issues surfaced in the Community agenda—most notably the goal of European unity among the member states.<sup>22</sup> In title II of the Act, the widely touted date of 1992 was set as the target date for completion of an internal market without trade barriers, and toward that goal the Act granted the Council greater authority to enact legislation.<sup>23</sup>

Prior to the Single European Act, it was simply conventional wisdom that the European Communities had little if any competence to grapple with criminal law issues.<sup>24</sup> Thus, the member states were left to

TIES 331 (1978) (In light of differences in translation, the documents published by the European Communities are treated as authoritative for the purposes of this paper.).

19. Good, *Institutional Reform under the Single European Act*, 3 A.U.J. INT'L L. & POL'Y 299, 311-12 (1988).

20. In the words of the EEC Treaty, the Court of Justice "ensure[s] the observance of law and justice in the interpretations and applications of this treaty." EEC Treaty, *supra* note 17, at art. 164. The Court of Justice has consistently taken a progressive and pragmatic approach in this regard. See Recent Development, *European Economic Community—The Use of Article 173(2) of the EEC Treaty to Contest Actions of the European Parliament, Partie Ecologiste 'Les Verts' (the Greens) v. European Parliament* [1987], 2 COMMON MKT. L. REV. 343 (1986), 18 GA. J. INT'L & COMP. L. 85 (1988). Not only does the Court of Justice have primary jurisdiction over certain matters, such as disputes between member states & Community institutions, but also the Court has the authority to issue "preliminary rulings." These rulings are binding responses to requests for assistance from domestic courts or tribunals for assistance in interpreting a question of Community Law. EEC Treaty, *supra* note 17, at arts. 170, 177.

21. EEC Treaty, *supra* note 17, at art. 2.

22. COMMISSION OF THE EUROPEAN COMMUNITIES, SINGLE EUROPEAN ACT 2 (Supp. 1986). For an overview of the changes wrought by the Single European Act, see Good, *supra* note 19.

23. Schildhaus, *1992 and the Single European Act*, 23 INT'L LAW. 549, 552 (1989).

24. Bridge, *The European Communities and the Criminal Law*, CRIM. L. REV. 88 (1976); VAN DEN WYNGAERT, *Criminal Law and the European Communities: De-*

administer all criminal matters. This fact proved especially troubling in the context of Community commercial policy, for along with the Community's payment of premiums, subsidies, and refunds, there invariably arose questions of abuse and fraud. To complicate matters, some crimes are only punishable at the national level under certain circumstances. For instance, obtaining financial aid under false pretenses in many member states is only punishable when against national interest, and it is possible that a similar crime against Community interests would go unpunished.<sup>25</sup> Prosecution for crimes against the Community is sometimes referred to as indirect enforcement when the prosecution is conducted at the member state level. The limitations of this approach are obvious, for some states have been more diligent than others when it comes to criminalizing acts against the Communities.<sup>26</sup>

During the 1970s, the countries of the European Communities considered ways to improve this system of indirect enforcement. Their efforts resulted in two draft conventions establishing new offenses against Community interests. One of the conventions criminalized certain offenses against financial interests of the Community, and the second dealt with the criminal responsibility of Community civil servants. Both drafts were discussed, but not ratified.<sup>27</sup>

Though no broad expansion of substantive criminal law at the Community level appears immediate, the marketplace that each of the member states operates within is expanding and changing rapidly. Basically, the Single European Act has made progress towards a European economic union a priority without directly addressing collateral issues in substantive criminal law. This state of affairs has led some to conclude that 1992 may prove to be a boon to sophisticated criminals.<sup>28</sup>

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*fining Issues*, in TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE 247 (1983); Harding, *The European Communities and Control of Criminal Business Activities*, 31 COMP. L.Q. 255 (1982).

25. VAN DEN WYNGAERT, *supra* note 24, at 247-48. The authority for Community payments in this area is set forth in the EEC Treaty. See EEC Treaty, *supra* note 17, at arts. 39 & 40.

26. B. ZAGARIS & A. FANTAUZZI, *European Integration and International Criminal Law*, 1 1992 THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION 9 (No. 11, 1989).

27. Zagaris & Fantauzzi, *Application of Foreign Criminal Laws to U.S. Businesses Abroad*, 1 INT'L Q. 126 (October 1989).

28. M. BORNHEIM & B. ZAGARIS, *International Cooperation Against Money Laundering in the European Integration Context*, 1 1992 THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION 13 (No. 15, 1989).

With the free circulation of goods, services, and capital, criminals will have an easier time moving operations and capital from country to country.<sup>29</sup>

Nevertheless, preparations for 1992 have not wholly overlooked the criminal element in the member states, and the Community institutions have been taking an active role in defining Community policy in this regard. The following subsections describe briefly some of the most recent and significant efforts of these institutions to further define the criminal process at the Community level.

### 1. The European Parliament

In 1985, the Parliament set up a Committee of Enquiry to look into the Community drug problem. This committee enjoyed a broad base of support from parties across the political spectrum. Upon concluding their inquiry, the Committee issued a report. The aim of the report was to set forth a basic understanding of the facts of the situation upon which to base proposals for improving both the short and long term outlook within the Community.<sup>30</sup>

The Committee discovered that the 1970s and 1980s saw a rise of serious proportions in hard drug use. At the time of the report, it was estimated that as many as 1.5 million people in the Community were regular users of heroin. Accompanying this increase in drug use are other more sinister and subterranean developments. The Committee noted that drug traffickers and criminal organizations are emerging in strength. In the words of the Committee, "[t]he activities of these organizations constitute an unprecedented attack on national and international social order."<sup>31</sup> In the face of this problem, the Committee concluded that the European Community suffered from a lack of coordination exacerbated by the absence of any strategic roadmap for the future.<sup>32</sup>

Developing an adequate strategy would be no easy task, the Com-

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29. According to Bank of Italy Governor, Carlo Azeglio Campi, the Mafia has billions of dollars waiting to be laundered and converted into various investments. *Id.*; see also Parmelee, *European Unity: An Offer the Mafia Can't Refuse*, Wash. Post, May 19, 1989, at F1, col 5.

30. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, COMMITTEE OF ENQUIRY INTO THE DRUGS PROBLEM IN THE MEMBER STATES OF THE COMMUNITY 12 (1987) [hereinafter ENQUIRY].

31. *Id.* at 13.

32. *Id.*

mittee conceded—especially in the substantive legal realm. Section IV of their report was devoted entirely to discussing some of the broad legal issues that demand Community-wide attention. The beginning of the section framed the discussion by raising a fundamental, if not controlling, concern: the wide variation in laws and penalties found in the criminal systems of the member states.<sup>33</sup> Within this topic, the Committee focused on four significant aspects: sentencing, extradition, freezing of assets, and money laundering.<sup>34</sup>

During the discussion the Committee made the following recommendations: 1) the Community address the issue of sentencing through harmonization of member states law or by adopting a "Community position" on the subject; 2) extradition be dealt with by the adoption of a multilateral European agreement;<sup>35</sup> 3) seizure and freezing of assets be addressed by "common legislation across the community" with the seized assets to be used directly to combat the problem; and 4) the European Commission address money laundering by publishing guidelines, and issuing a directive requiring currency transaction reporting.<sup>36</sup> In addition, the report identified the need for a Community computer database to house relevant information.<sup>37</sup>

## 2. The Council of Ministers of the European Communities

Though the Council of Ministers has not fully addressed all the points raised by the extensive report of the European Parliament's

33. *Id.* at 44. "The matter is complicated by the fact that Napoleonic and Common Law exist in different countries within the Community. In addition the individual constitutions of some countries make it difficult to apply certain laws across the Community." *Id.*

34. ENQUIRY, *supra* note 29, at 45. However, the report acknowledged the broader reach of the subject: "Throughout it will be important to ensure as far as humanly possible that the law is applied in equal measure in all countries of the Community." *Id.*

35. *Id.* at 45.

36. *Id.* at 46-47. Basically, such an arrangement would be a European version of the International Currency Control Authority suggested in the Anti-Drug Abuse Act and the Interpol working group resolution of April 21, 1989. M. BORNHEIM & B. ZAGARIS, *supra* note 28, at 14. Note that some countries, such as Italy, have expressed reservations about detailed currency transaction reporting. *Id.* For an overview of some recent U.S. activity in this area, see Plambeck, *The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L LAW. 69 (1988).

37. *Id.* at 57-58. See also ICC, *EC to Establish European Drug Intelligence Unit*, COM. CRIME INT'L 1 (1989).

Committee of Enquiry, it has taken steps toward improving international cooperation in criminal matters within the European Communities. In May of 1987, the Ministers of Justice met in Brussels. This Council of Ministers clearly expressed a resolve to tackle some of the problems facing the European Communities in cooperation in criminal matters. Specifically, the Council reminded the Commission of the European Communities of the urgent need to accelerate international legal cooperation in criminal matters. According to the Council, this increased cooperation is necessary to facilitate the development of a "European legal area" as envisioned by the Single European Act.<sup>38</sup>

The Council went on to discuss and endorse specific developments. In particular, the Council applauded the member states signing the conventions on the transfer of sentenced persons and double jeopardy.<sup>39</sup> Also, the Council examined possible reforms that can be made to the extradition process.<sup>40</sup> Though the scope of the above developments was limited, recent developments indicate the Council is willing to expand the range of issues it will address.<sup>41</sup> This trend is both promising and necessary if there is to be a European legal area.

### 3. The Commission of the European Communities

In addressing international crime, the Commission of the European Communities has been active in both its capacity as an advisor and as an initiator of legislation. Indeed, they have addressed these matters both within and without the Communities.

In a seminal proposal on November 26, 1986, the Commission outlined a broad program to combat the growing drug problem.<sup>42</sup> The purpose of the program was to "initiate an ongoing dialogue between the member states and the Commission aimed at identifying the priorities

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38. Council of the European Communities, Press Release 1167th Council Meeting 5 (1987) [hereinafter Press Release].

39. *Id.* at 6. For a more detailed treatment of the double jeopardy issue, see 1983-1984 EUR. PARL. DOC. (No.1-1397/83), Report of the Legal Affairs Committee (1984).

40. Press Release, *supra* note 38, at 6-7.

41. Zagaris & Fantauzzi, *Breaking the Connection*, 34 SEC. MGMT. 46, 49 (June 1990). In May of 1989, an informal meeting of the Council witnessed the opening for signature of an European Community convention on international criminal cooperation. Fantauzzi, *EEC Ministers of Justice Meet on International Criminal Cooperation*, 5 INT'L ENFORCEMENT L. REP. 220-21 (June 1989).

42. *Fight Against Drugs in the Community*, BULL. OF EUR. COMM. 8 (1986).

and areas in which cooperation is essential if the fight against drug addiction is to succeed."<sup>43</sup> The Commission's proposal was a follow-up to factfinding activities like those of the European Parliament discussed earlier.<sup>44</sup>

With similar vigor, the Commission has pursued the matter externally. In 1987, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was negotiated.<sup>45</sup> Following its completion, the Commission submitted a proposal for a Council of Ministers decision on the signing of the Convention.<sup>46</sup>

More recently, the Commission has begun to aggressively pursue specific proposals geared toward internal structural changes needed in light of 1992. On February 10, 1989, the Commission issued the proposal for a Council Directive amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the member states in the field of direct taxation and value-added tax.<sup>47</sup> The proposal mandated the development of national legislation which would abolish restrictions on the exchange of information due to administrative practices.<sup>48</sup>

These efforts complement new anti-fraud measures proposed by the European Commission. Here too the management of information is essential for law enforcement. Managing common commercial policies, such as the Common Agricultural Policy, has proven intricate, and the coordination of accounting controls among the member states is an essential step if 1992 is to be met without encouraging wholesale fraud.<sup>49</sup>

43. *Id.*

44. *See id.*

45. *See United Nations: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Dec. 20, 1988, U.N. Doc. E/CONF. 82/15, Corr. 1 and Corr. 2, reprinted in 28 I.L.M. 493 (1989).

46. Commission of the European Communities, Proposal for a Council Decision, Jan. 26, 1989.

47. Reprinted in *EC Prepares International Tax Enforcement Strategy*, 5 INT'L ENFORCEMENT L. REP. 297 (Aug. 1989).

48. *Id.* Also in preparation for a single capital market, a formal proposal was issued considering a Community-wide 15% withholding tax on interest income. This too would involve an increased rate of exchange of tax information. *See Liberalizing EC Capital Movements at the Price of Tax Avoidance*, 5 INT'L ENFORCEMENT L. REP. 50 (Feb. 1989).

49. Morris, *EC Finance Ministers Discuss New Anti-Fraud Proposals*, 5 INT'L ENFORCEMENT L. REP. 268-69 (July 1989). However, these anti-fraud efforts have yet to fully address the problem. *See Zagaris, EC Court of Auditors Report Indicates Fraud in EC Export Refund System*, 6 INT'L ENFORCEMENT L. REP. 267 (July 1990).

Both of the areas mentioned above, exchange of information in tax matters and accounting controls, fall within the predominantly commercial matters where the European Communities' competence is traditionally asserted. A more controversial step this year was the Commission's proposal for a directive which focused on preventing the Community financial system from being used for money laundering.<sup>50</sup> The proposal, if realized, would call on credit and financial institutions to scrutinize transactions, challenging them when the true identity of the customer is in doubt or no economic and lawful purpose appears present. Moreover, the institutions would be required to notify law enforcement authorities on their own initiative.<sup>51</sup>

## B. *The Council of Europe*

The Council of Europe was formed on August 3, 1949, when the Statute of the Council of Europe went into effect.<sup>52</sup> The signatories came together with the understanding "that the pursuit of peace based upon justice and international cooperation is vital for the preservation of human society and civilisation."<sup>53</sup> There are two principal organs of the Council of Europe, the Committee of Ministers and the Consultative Assembly.<sup>54</sup>

The Council of Europe, through its organs, investigates matters of importance to its members, and in some cases issues recommendations to its members. The Consultative Assembly deliberates and debates matters within its competence, and presents its conclusions to the Committee of Ministers.<sup>55</sup> The Consultative Assembly may, when appropriate, establish committees and commissions to consider and report on

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For an example of the fraud problem, see *supra* notes 24-26 and accompanying text.

50. Nilsson, *European Legal Cooperation in Criminal Matters*, A.B.A. Panel on International Criminal Cooperation in European Business Crimes in a Rapidly Changing Environment, A.B.A. Nat'l Convention, Aug. 7, 1990, at 3, 19.

51. *Id.* at 20.

52. STATUTE OF THE COUNCIL OF EUROPE, Aug. 3, 1949, 87 U.N.T.S. 103 [hereinafter STATUTE OF THE COUNCIL].

53. *Id.* at Preamble. The 12 members of the European Communities are also members of the Council of Europe.

54. *Id.* at art. 10. The Council sits in Strasbourg. *Id.* at art. 11.

55. *Id.* at art. 22. The Assembly consists of representatives selected by the respective national parliaments. *Id.* at art. 25. Its competence is rather broad except that it does not deal with issues of national defense and should not interfere with the work of international organizations. See *id.* at art. 23.

specific matters.<sup>56</sup> Upon receiving the recommendation of the Consultative Assembly, the Committee of Ministers considers what action would further the goals of the Council of Europe. The Committee may also examine matters and issue conclusions on its own motion. In its conclusions the Committee is free to put forth a range of options, including the adoption of international agreements and common policies.<sup>57</sup>

In this manner the Council has been actively addressing international components of the criminal process. Historically, their approach has been pragmatic. For instance, noting that the territoriality principle of jurisdiction did not adequately address the transborder elements of modern criminal activity, the Council promoted the 1964 Road Traffic Convention which departed from the territoriality approach.<sup>58</sup> Not only does it allow the state of residence to prosecute, at the request of the state of offense, an offense on the latter's territory, but also the state of residence is permitted, at the request of the state of offense, to enforce foreign judgements of the latter.<sup>59</sup>

While the Council has maintained a progressive approach to transborder criminal activity, the member governments have lagged behind in the area of conventions. For example, only a handful of governments have ratified the 1964 Road Traffic Convention.<sup>60</sup> Some have concluded that the reason for this is that member governments were not alarmed enough by the spread of crime.<sup>61</sup>

However, recent developments in the area of conventions give reason to be optimistic, and progress has been made in areas outside of the signing of conventions. The following subsections describe some of these promising developments.

56. *Id.* at art. 24.

57. STATUTE OF THE COUNCIL, *supra* note 52, at art. 15(a). "In appropriate cases, the conclusions of the Committee may take the form of recommendations to the Governments of Members, and the Committee may request the Governments of Members to inform it of the action taken by them with regard to such recommendations." *Id.* at art. 15(b).

58. See Muller-Rappard, *The European System*, II INT'L CRIM. L. 95, 100-101 (M.C. Bassiouni ed. 1986).

59. Of course, the aforesaid provisions only apply to offenses that are related to road traffic. *Id.*

60. *Id.* at 110-11.

61. *Id.* at 97-98.



# 1. Cooperation Group to Combat Drug Abuse and Illicit Trafficking in Drugs—The Pompidou Group

The Pompidou Group was formed in 1971 at the suggestion of Georges Pompidou, President of the French Republic, to his colleagues in Western Europe. The Group undertook to examine, from a multidisciplinary point of view, the problems of drug trafficking and abuse. The Group does not have the official character of an international organization, but it has conducted its activities since 1980 under the auspices of the Council of Europe.<sup>62</sup>

In the spring of 1980, the Committee of Ministers sanctioned an agreement for operating the Pompidou Group within the Council of Europe. Under this agreement, governments outside the Council of Europe may join with the unanimous agreement of the Group members. Still others, like the United States, have begun to participate on an ad hoc basis.<sup>63</sup> The members are represented at ministerial meetings by the appropriate minister from the member's government.

Like the European Parliament, the Pompidou Group has proven adept at gathering information. On September 12 and 13, 1984, the Seventh Ministerial Conference met in Paris where it was decided that the Group should examine cooperation between the criminal justice system and social/health services. A subsequent working group pro-

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62. Council of Europe, *A Brief Description of the Activities of the Pompidou Group and Its Establishment within the Framework of the Council of Europe* 1, Oct. 4, 1989, P-PG(88) Inf. 1.

63. *Id.*

The original members of the Group were Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, and the United Kingdom. Denmark, Ireland, and Sweden were subsequently admitted to the Group. Turkey joined the Group when the Partial Agreement was established by the Council of Europe in March 1980. Since then Greece became a member in 1981, Norway in 1983, Spain in 1984, Portugal and Switzerland in 1985, Finland in 1987, Austria on 1 January 1988, Malta on 1 April 1988 and Cyprus on 1 October 1989 bringing the number of member states to 20.

Certain countries which are not members of the Council of Europe participate in some activities of the Group on a technical ad hoc basis, for example, Canada, the United States, and the Holy See.

In addition since May 1986, the Commission of the European Communities takes part in the Group's work with a view to ensuring coordination of the two organizations' activities.

*Id.*

posed that two symposia be held on the subject.<sup>64</sup> The first, held on October 29 and 31, 1986, collected a wealth of information on the subject, cataloguing differences among the members in prosecution, treatment,<sup>65</sup> sanctions, et cetera.<sup>66</sup> The second, geared towards rehabilitation issues, was held on December 1 through 4, 1987.<sup>67</sup> Though such broad based symposia are not a frequent occurrence, the Pompidou Group's factfinding efforts have been maintained over the years, and the Group continues to keep track of developments between and within Group members.<sup>68</sup>

Their factfinding activities are complemented by their efforts to coordinate international measures to combat the drug problem. Often, these efforts focus on developing international agreements.<sup>69</sup> For instance, the Eighth Ministerial Conference noted that a convention or multilateral agreement would be useful in dealing with drug trafficking in international waters and the confiscation of drug trafficking proceeds.<sup>70</sup>

Regarding drug trafficking, the Group has proven especially persistent. In a Political Declaration at the Extraordinary Ministerial Conference in May of 1989, the Group "urged that the current work in the Council of Europe on the preparation of a European Convention on the search, seizure, and confiscation of the proceeds from crime be expedited."<sup>71</sup> The Group noted that international cooperation is essential for progress because criminal activity in this area has reached new levels of

64. COUNCIL OF EUROPE, SYMPOSIUM ON DRUG MISUSERS IN CRIMINAL PROCEEDINGS: A DIFFICULT BALANCE BETWEEN PUNISHMENT AND TREATMENT 3 (1987).

65. *Id.* at 24.

66. *Id.* at 116.

67. COUNCIL OF EUROPE, SYMPOSIUM ON THE CRIMINAL JUSTICE SYSTEM AND SOCIAL REHABILITATION MEASURES FOR DRUG MISUSERS (1988).

68. E.g., Council of Europe, *Background Document on the Cocaine Threat in Europe*, P-PG/MIN (89) 2 Revised (1989), Extraordinary Ministerial Conference, London 18-19 May 1989; Council of Europe, *Background Paper on HIV/AIDs and Addiction*, P-PG/MIN (89) 4 Revised (1989), Extraordinary Ministerial Conference, London 18-19, May 1989.

69. Council of Europe, *Declaration of the 8th Ministerial Conference*, (1987) P-PG/MIN (86) 5 Def., 8th Ministerial Conference, London 20-21, Jan. 1987.

70. *Id.*

71. Council of Europe, *Political Declaration of the Extraordinary Ministerial Conference in London May 18-19 4*, (1989) P-PG/MIN (89) 5 Def. The declaration went on to note that "[w]hen adopted this convention would provide a suitable framework for international, intra-European cooperation." *Id.*

sophistication.<sup>72</sup> Though earlier ad hoc technical conferences had provided some of the foundation for developing a convention to address the situation, the convention itself was slow to follow.<sup>73</sup> The Group noted that in this field, "there is no long-standing tradition of working cooperation."<sup>74</sup> In addition, current national legislation on the subject was woefully inadequate to cope with the problem. However, the Group was optimistic about the prospects for the future, noting that national differences on the subject were often matters of form more than substance.<sup>75</sup> The Group urged that members maintain a "steady momentum in developing international action."<sup>76</sup>

The optimism of the Group was not unwarranted, for in June of 1990, the Council of Europe's European Committee on Crime Problems adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.<sup>77</sup> Even more surprising was the fact that on November 8, 1990, the first day it was open for signature, twelve governments signed the Convention.<sup>78</sup>

## 2. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

Though the Convention was drafted with drug offenses particularly in mind, it was drafted broadly so that it addresses all types of criminality. Parties to the Convention will enjoy cooperation in the areas of investigation, search, and seizure in such diverse areas as arms dealing and trafficking in children.<sup>79</sup> The Explanatory Report to the

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72. Council of Europe, *Background Paper on Confiscation of the Proceeds of Drug Trafficking at the Extraordinary Ministerial Conference in London May 18-19, 1989* 2, (1989) P-PG/MIN (89) 3.

73. In 1983 and 1985, the Group held these technical conferences, but it was not until 1987 that the Council of Europe's European Committee on Crime Problems officially took up the matter. *Id.*

74. *Id.* at 3.

75. *Id.*

76. *Id.*

77. Council of Europe, *Draft Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, adopted at Strasbourg July 25, 1990, CDPC (90) 17 Addendum I [hereinafter COE Convention].

78. The governments which signed were Belgium, Cyprus, Denmark, Germany, Iceland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. Zagaris, *Twelve Countries Sign European Laundering Convention*, 6 INT'L ENFORCEMENT L. REP. 380 (Nov. 1990).

79. Council of Europe, *Draft Explanatory Report on the Convention on Laun-*

Convention noted that the broad sweep of the Convention would require some states to make substantial amendments to their domestic legislation in order to become parties to the Convention.<sup>80</sup> However, the experts drafting the Convention considered that the somewhat strict obligations of the Convention would be operating within a group of like-minded states so a certain spirit of cooperation would prevail.<sup>81</sup> Moreover, in the same vein, the drafters left out the word "European" in hopes that "like[-]minded states outside the framework of the Council of Europe" would choose to participate.<sup>82</sup>

### a. *Chapter I—The Use of Terms*

Chapter I sets out some of the basic terms utilized in the Convention. Article 1.a. defines "proceeds" to mean "any economic advantage from criminal offences."<sup>83</sup> This broad construction of the term includes assets and property that may be held by third parties.<sup>84</sup> Similarly, article 1.b. gives a broad definition of "property." It defines the term to include "property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property."<sup>85</sup> The "confiscation" of the afore-said is phrased in terms of a "penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences."<sup>86</sup>

The prevailing consideration behind Chapter I was to structure the scope of the Convention to be as wide as possible in principle. Any offense that produces huge profits might fall within the ambit of this chapter; examples include environmental offenses, insider trading, and economic fraud.<sup>87</sup> Realizing that the extensive nature of this Convention might cause delays in ratification, the drafters provided that reservations to certain subsequent provisions could be made by way of

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*dering, Search, Seizure, and Confiscation of the Proceeds of Crime*, Strassbourg, July 6, 1990, CDPC (90) 17 Addendum II, para. 8 [hereinafter *Explanatory Report*].

80. *See id.*

81. *See id.* at para. 14.

82. *Id.* at para. 18. In fact Australia, Canada, and the United States participated in the drafting and are three such "like[-]minded states." *Id.*

83. COE Convention, *supra* note 77, at art. 1.

84. *Explanatory Report*, *supra* note 79, at para. 21.

85. COE Convention, *supra* note 77, at art. 1.b.

86. *Id.* at art. 1.d.

87. *Explanatory Report*, *supra* note 79, at para. 27.

declaration.<sup>88</sup>

## b. *Chapter II—Measures to be Taken at the National Level*

Generally, Chapter II prescribes the legal infrastructure that signatories will need to implement the Convention. The articles of this chapter list measures that the parties “shall adopt.”<sup>89</sup>

Articles two, three, and four deal with confiscation, investigative and provisional measures, and special investigative powers and techniques, respectively. As in Chapter I, the approach of these articles is broad in scope. For example, confiscation is to be permitted both of specific items and items of equivalent value,<sup>90</sup> and provisional measures must be developed to identify and prevent the disposition of these items.<sup>91</sup> However, unlike Chapter I, reservations to article two were permitted insofar as the categories of covered offenses is concerned,<sup>92</sup> though it was anticipated that parties would do so sparingly.<sup>93</sup>

The need for such reservations is further minimized by the inclusion of article five. This article calls on parties to insure that the rights of innocent parties are preserved.<sup>94</sup> The provision implies that parties should be given an opportunity to be heard in court with the assistance of counsel.<sup>95</sup>

The final article of the chapter, article six, establishes an obligation to criminalize money laundering.<sup>96</sup> Furthermore, to the extent that it is not contrary to a party's constitution or basic legal concepts, criminalization of “money laundering” should include the knowing use or possession of “proceeds” or aiding and abetting in the commission of money laundering.<sup>97</sup> Again, reservations are permitted insofar as the

88. COE Convention, *supra* note 77, at art. 2.2.

89. *E.g.*, COE Convention, *supra* note 77, at art. 2.1. *But see id.* at art. 4.2. (dealing with special investigative techniques such as wiretapping and stating, “[e]ach party shall *consider* adopting such legislative and other measures as may be necessary . . .”) (emphasis added).

90. *Id.* at art. 2.1; *see also id.* at art. 13; *Explanatory Report*, *supra* note 79, at para. 48.

91. COE Convention, *supra* note 77, at art. 3.

92. *Id.* at art. 2.2.

93. *Explanatory Report*, *supra* note 79, at para. 27.

94. COE Convention, *supra* note 77, at art. 5.

95. *Explanatory Report*, *supra* note 79, at para. 31.

96. COE Convention, *supra* note 77, at art. 6.1.

97. *Explanatory Report*, *supra* note 79, at para. 32.

categories of covered offenses is concerned,<sup>98</sup> but it should be noted that reservations under this article are independent of any in article two.<sup>99</sup>

### c. Chapter III—International Cooperation

Building on the foundation laid by the first two chapters, Chapter III sets forth the obligations and procedures needed to connect internationally the national measures described by the previous chapter. This chapter is divided into sections with each section addressing a general topic elaborated upon through the articles therein.

Section one describes the guiding principles to be used in construing the sections that follow.<sup>100</sup> Article 7.1. states the general rule that "[p]arties shall cooperate with each other to the widest extent possible . . . ."<sup>101</sup> To do so, article 7.2. mandates that parties "shall adopt" any needed legislation to provide the international linkage to comply with requests for assistance from another party.<sup>102</sup> Though phrased expansively, the Explanatory Report makes clear that this section is defined by the parameters of the Convention; thus, for example, "fishing expeditions," which are not contemplated by the Convention, do not fall within the obligation to cooperate.<sup>103</sup>

What does fall within the obligation to cooperate is further defined quite specifically in sections two,<sup>104</sup> three,<sup>105</sup> and four,<sup>106</sup> which deal with investigative assistance, provisional measures, and confiscation, respectively. The initial article of each section requires the requested party to comply with a request from the requesting party.<sup>107</sup> Later articles in each of the sections provide that the request will be executed in accordance with the domestic legislation of the requested party.<sup>108</sup>

98. COE Convention, *supra* note 77, at art. 6.4.

99. *Explanatory Report*, *supra* note 79, at para. 34.

100. *Id.* at para. 35.

101. COE Convention, *supra* note 77, at art. 7.1.

102. *Id.* at art. 7.2.

103. *Explanatory Report*, *supra* note 79, at para. 35. "If the requesting party has no indication of where the property might be found, the requested party is not obligated to search, for instance, all banks in the country; *cf.* Article 27, paragraph 1(e)(ii) [*sic*]." *Id.*

104. COE Convention, *supra* note 77, at art. 8.

105. *Id.* at art. 11.

106. *Id.* at art. 13.

107. *See supra* notes 93-95.

108. COE Convention, *supra* note 77, at arts. 9, 12, 14.

However, the execution of the request via domestic machinery does not mean that the grounds for a request are always subject to a *de novo* review. For example, when the competent authorities of a requesting state have determined the factual basis for a confiscation request, the competent authorities of the requested state should not then re-try the facts. Rather, the requested authorities should respect the decision of a competent foreign authority.<sup>109</sup>

Despite these strict obligations, a requested state may still refuse to cooperate, citing one of the grounds listed in section five, Refusal and Postponement of Cooperation. The grounds listed here range from sovereignty interests<sup>110</sup> to a *de minimis* exception where a sum to be confiscated will not outweigh the expense of confiscation.<sup>111</sup> Though the drafters concede that this section gives a requested state broad leeway to refuse a request, they stress that it nevertheless places some restrictions on refusal.<sup>112</sup>

Assuming cooperation is present, the issue of the rights of third parties may arise. Section six, Notification and Protection of Third Parties' Rights, deals with providing notice and an opportunity to be heard.<sup>113</sup> This section coordinates and secures the rights of third parties. As a general proposition, the rights of third parties may be addressed in either the requesting or requested state. However, the actual forum will be decided on the basis of procedural considerations particular to the parties involved.<sup>114</sup>

Section seven is the final section of this chapter, entitled Procedural and Other General Rules. The section sets out basic procedures to administer the international cooperation. These provisions address generally such matters as the format of the request,<sup>115</sup> to whom it should be addressed,<sup>116</sup> confidentiality,<sup>117</sup> and costs.<sup>118</sup>

109. *Explanatory Report*, *supra* note 79, at para. 52.

110. COE Convention, *supra* note 77, at art. 18.b.

111. *Id.* at art. 18.c; *see also Explanatory Report*, *supra* note 79, at para. 62.

112. *Explanatory Report*, *supra* note 79, at para. 58.

113. COE Convention, *supra* note 77, at arts. 21, 22.

114. *Explanatory Report*, *supra* note 79, at para. 81; *see also* COE Convention, *supra* note 77, at art. 30 (obligating a party who refuses to cooperate to give reasons for refusing).

115. COE Convention, *supra* note 77, at arts. 25, 27. These provisions are somewhat detailed covering translations, content, and methods of communication. *Id.*

116. *Id.* at arts. 23, 24.

117. *Id.* at art. 33.

118. *Id.* at art. 34.

#### d. Chapter IV—Final Provisions

Most of the provisions in Chapter IV are model clauses used by the Council of Europe.<sup>119</sup> These provisions cover reservations,<sup>120</sup> accession,<sup>121</sup> ratification,<sup>122</sup> et cetera.

The one notable exception is article forty-one, dealing with amendments. Unlike other penal law conventions concluded in the Council of Europe, this provision allows for minor amendments without the necessity of protocols.<sup>123</sup>

Lastly, it should be noted that provisions for dispute settlement are not specifically prescribed. A standard list of possible methods for dispute resolution is offered, leaving it to the parties to decide upon a particular method by agreement.<sup>124</sup>

### IV. PROSPECTS FOR FUTURE DEVELOPMENT OF THE EUROPEAN REGIME

This section elaborates on some of the developments mentioned in the previous section, and introduces others. The subsections that follow point out areas and proposals that, if pursued and ratified, will expand and further define the scope of the European regime of international cooperation in criminal matters.

#### A. The European Communities

##### 1. Directive on Money Laundering

On December 17, 1990, the Council of Economic and Finance Ministers (ECOFIN Council) agreed on a common position for a directive to address money laundering.<sup>125</sup> The directive, if finalized would go into effect January 1, 1993, calling on member states to make launder-

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119. *Explanatory Report*, *supra* note 79, at para. 93.

120. COE Convention, *supra* note 77, at art. 40.

121. *Id.* at art. 37.

122. *Id.* at 36.

123. *Id.* at art. 41. *See also Explanatory Report*, *supra* note 79, at para. 96.

124. COE Convention, *supra* note 77, at art. 42.

125. Zagaris, *EC Finance Ministers Reach Agreement on a Money Laundering Directive*, 6 INT'L ENFORCEMENT L. REP. 432 (Dec. 1990). The position was reached after discussion of the *Proposal for a Council Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering*, March 23, 1990, COM (90) 106 final SYN 254.



ing drug trafficking proceeds a criminal offense.<sup>126</sup>

Though the draft directive initially only requires action in the realm of drug proceeds, it also allows member states the option of applying this convention to other areas such as terrorism and kidnapping. Furthermore, it calls for the establishment of a working party to examine the possibility of uniformly extending the directive to other criminal activities.<sup>127</sup> Supplementing the substantive requirements of the directive are procedural provisions. In this regard, financial and credit institutions would be subject to certain reporting requirements, including a duty to report suspicious transactions.

However, the most significant aspect of this draft is the manner in which it deals with the question of the Communities' limited jurisdiction. It provides that member states take all necessary measures to implement the provision, including participation in a multilateral declaration in which it is agreed that penal sanctions will apply to credit and financial institutions which refuse to comply with the directive. This approach is to counter objections that criminal law is outside the scope of Community law, for the penal sanctions themselves would be a requirement of an extra-Community agreement. In a similar vein, it is contemplated that some of the new democracies in Eastern Europe may be able to associate themselves with the agreement.<sup>128</sup>

## 2. European Communities as International Actor

The European Communities, as an entity, has participated in negotiations at the international level. As noted earlier, the United Nations Drug Convention is one example.<sup>129</sup> Whether the Commission's proposal for a Council decision on the Convention will be followed—and to what extent it will create obligations on the member states—remains uncertain. However, if the Council does issue a binding decision, the mere fact that the Communities will be taking such a position on the Convention demonstrates potential for future international cooperation in criminal matters at the Community level.

In addition, Community level cooperation is evident in other areas outside of treaty negotiations. Two notable examples of this cooperation

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126. For additional background, see Kellaway, *Agreement to Outlaw Laundering of Money in the Community*, Fin. Times, Dec. 18, 1990, at 20, col.5.

127. *Id.*

128. *Id.*

129. See *supra* note 46 and accompanying text.

are the Communities' participation in Interpol and the Basle Committee on Banking Regulation and Supervisory Practices. Both of these organizations have adopted rules or declarations on the subject of monitoring suspicious financial transactions.<sup>130</sup> By participating and exchanging views on the subject, the Communities will be able to further hone internal policy on the same subjects.

### B. *Council of Europe's Influence on Non-Member States*

A consequence of the Council of Europe's involvement in the international regime is that human rights are given added attention, for in article three of the Statute of the Council, there is the requirement that members of the Council "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."<sup>131</sup> Though this obligation is addressed to members of the Council of Europe, its influence reaches non-members.

In this regard, the Council of Europe is monitoring the human rights situation in Eastern Europe. The new democracies in Eastern Europe that want to join the Council will have to demonstrate the necessary respect for human rights. Implicit in such a demonstration is a criminal process that respects human rights. Furthermore, the same measures that secure human rights domestically can also be expected to foment international cooperation in criminal matters: for in the Western European regime, provisions for human rights are often a factor, if not a prerequisite, to international cooperation in criminal matters.<sup>132</sup>

Already, Eastern European countries have demonstrated an eagerness to accept advice and training on certain criminal justice policies, such as white collar crime. In the future, it appears probable that the Council's influence in Eastern Europe, and thus, the European regime,

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130. For the Interpol Resolution, see Resolution Adopted by Working Group on Assets Derived from Crime—St. Cloud, France, April 1989; see also *Assembly Passes and Begins Implementation of Currency Information Resolution*, 6 INT'L ENFORCEMENT L. REP. 96 (Mar. 1990). For the Basle Committee, see Committee on Banking Regulation and Supervisory Practices, Prevention of Criminal Use of Banking System, Draft Code of Conduct (B.S./88/52 May 9, 1988); see also Zagaris & Bornheim, *Foreign and International Money Laundering Laws*, MONEY LAUNDERING ENFORCEMENT LEGAL AND PRACTICAL DEVELOPMENTS (Criminal Justice Section, A.B.A., Oct. 26-27, 1989).

131. STATUTE OF THE COUNCIL, *supra* note 52, at art. 3.

132. See Nilsson, *supra* note 50, at 6.

will continue to grow.

### C. *The Schengen Accord*

In addition to developments in the context of the European Communities and the Council of Europe, international cooperation has surfaced in Europe in other areas. The Schengen Accord, signed June 19, 1990, by five countries, is one example.<sup>133</sup>

Generally, this accord provides that signatory countries will strengthen cooperation between police and justice officials in the signatory countries. This effort will formalize the already existing informal cooperation that allows police to pursue criminal suspects across their national borders.<sup>134</sup> Also, signatories agree to begin working on the simplification of information exchange and extradition procedures and the harmonization of gun-control legislation.

Regarding illicit drug trafficking, several articles of the accord address the issue specifically. For instance, one article provides for the establishment of a permanent working group to examine the problems of and design solutions to illicit drug trafficking,<sup>135</sup> while another provision serves to supplement the 1988 United Nations Drug Convention and efforts of the Communities such as the directive discussed above.<sup>136</sup>

It is anticipated that more countries will be signing the accord in the near future.<sup>137</sup> Expanding cooperative efforts in this manner, outside the framework of the Council and Communities, will add to and further define Europe's international regime. Moreover, developments of this type serve as further proof of the flexible nature of regimes.<sup>138</sup>

133. Convention to Apply the Schengen Agreement of June 14, 1985. Among the Countries of the Benelux Economic Union, Federal Republic of Germany, the French Republic Relative to the Gradual Suppression of Border Controls, signed on June 19, 1990, in Schengen [hereinafter Accord]. For a discussion of the Schengen Accord's enforcement provisions, see *Five EC Members Reach Agreement on Schengen Accord*, 6 INT'L ENFORCEMENT L. REP. 226 (June 1990) [hereinafter *Five EC Members*]. The five signatories are Belgium, Luxembourg, the Netherlands, France, and Germany.

134. In some cases, police officers from one country will be able to chase criminal suspects up to ten kilometers (6.21 miles) into a neighboring country. *Five EC Members*, *supra* note 133.

135. Accord, *supra* note 133, at art. 70.

136. Accord, *supra* note 133, at art. 71.

137. Two likely candidates for signature are Spain and Italy. *Id.*

138. See W. FELD & R. JORDAN, *supra* note 14 and accompanying text.

## V. CONCLUSIONS—IMPACT OF THE EUROPEAN REGIME

A. *As a Model for Other Regional Groups*

The study of the European regime's approach to illicit narcotics trafficking and money laundering has significance for other regional groups, because many other regional groups are contemplating establishing regimes and are searching for the proper models. In light of the changes in international money movement and illicit narcotics trafficking, other regional groups, such as the Caribbean Common Market and Community (CARICOM), have agreed on the need to take action against these problems. However, their proposals are not yet as definite and sophisticated as the actions of the European Communities or the Council of Europe.<sup>139</sup>

Nevertheless, the need for international cooperation is just as evident, if not more so, in groups like CARICOM. None of the members of CARICOM have the means to take unilateral action because, unless they take action in a uniform manner, the countries taking action will likely lose economically as illicit profits move to their nonconforming neighbors.<sup>140</sup> In this economically depressed region, such a result might be difficult to justify politically. To facilitate the necessary cooperation, the institutional models of a European Committee on Crime Problems have been suggested for the Americas: the establishment of an Americas Committee on Crime Problems with the Assistant Ministers of Justice and their assistants meeting on a regular basis to discuss and take action and cooperate against drugs, money laundering, and a panoply of criminal justice problems.<sup>141</sup>

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139. See, e.g., the communiques of the Tenth Meeting of the Conference of Heads of Government of the Caribbean Community from July 3-7, 1989 (support for the establishment of a multilateral force under the aegis of the United Nations to provide assistance in intelligence and interdiction of illicit narcotics and for the creation of an international criminal court to investigate and adjudicate criminal responsibility of persons allegedly engaged in drug trafficking); and the communiques of the Eleventh Heads of Government Meeting on August 2, 1990 (support for the development of mechanisms to protect the regional international banking and financial systems from subversion by the international drug traffickers). See *Caribbean Heads of Government Issue Communique*, 6 INT'L ENFORCEMENT L. REP. 336 (1990).

140. See the excellent discussion by Sanders in *The Drug Problem: Social and Economic Effects—Policy Options for the Caribbean*, 3 CARIBBEAN AFF. 18 (1990).

141. For a discussion of this idea, see Zagaris & Papavizas, *Using the Organization of American States to Control International Narcotics Trafficking and Money Laundering*, 57 REV. INT'L DE DROIT PENAL 118 (1986). For further discussion of

Proper consideration of the appropriate models requires an understanding of the origins and status of existing international regimes and organizations. Moreover, a consideration of regimes is at a premium in the Caribbean where within CARICOM there exists dynamic sub-regional groupings, such as the Organization of East Caribbean States (OECS), containing still another informal sub-sub-regional group, the Leeward Islands Group.<sup>142</sup>

## B. *On International Cooperation with the United States*

The current United States' posture towards international cooperation in criminal matters is not wholly encouraging. Recent remarks by William P. Barr, a Deputy Attorney General at the Justice Department, make clear that the advocates of hard power, unilateral action have a voice in the current administration. For example, in Mr. Barr's opinion, the United States is free to seize foreign criminals (particularly drug traffickers) and bring them to the United States for trial. According to Mr. Barr, the authority for such acts is provided by domestic laws, regardless of customary international law to the contrary.<sup>143</sup>

However, soft power, cooperative approaches are also being pursued by the Justice Department. Mark Richard, the Director of International Affairs, has expressed enthusiasm for updating treaty relations with other countries, while simultaneously continuing to work with existing treaties.<sup>144</sup>

Clearly, a hard power approach to criminal matters in Western Europe would be an extreme and untenable position. If the United States is to develop an effective international criminal policy with regard to Europe, it will have to develop more effective ways of working with Western Europe's international regime. Recently, the United

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recent developments in the Caribbean, see Zagaris, *Caribbean Financial Action Task Force Aruba Meeting Presages Cooperation by Caribbean Jurisdictions*, 6 INT'L ENFORCEMENT L. REP. 217 (1990).

142. See W. FELD & R. JORDAN, *supra* note 14 and accompanying text. Also, in this regard, the Communities and the Council of Europe have examined some of the benefits and difficulties of cooperation between regional groups. Commission of the European Communities, Commission Communication to the Council on relations between the Community and the Council of Europe, Brussels, March 8, 1989, COM(89) 124 final [hereinafter Commission of the European Communities].

143. Anderson, *Fighting the International Drug War*, A.B.A.J. 24 (Jan. 1991).

144. *Id.* at 25.

States has experienced difficulties in working with this regime,<sup>145</sup> and future difficulties appear likely.<sup>146</sup> Though the United States has shown some interest in working with the European regime,<sup>147</sup> it cannot be assured of an effective policy in Europe without a more aggressive commitment to work with the existing regime. Such a commitment requires that United States practitioners and policymakers familiarize themselves with the regime.

### C. *On Future Western European Cooperation in Criminal Matters*

Though the European regime's sophistication is due in part to the active sponsorship of both the Council of Europe and the European Communities, this dual sponsorship is not without attendant difficulties. Both organizations have distinctly separate agendas, and the potential for redundant and conflicting approaches to cooperation in criminal matters is real.

In acknowledgement of the need to coordinate the activities of the two organizations, formal structures have appeared to ensure that dialogue between the two groups is maintained.<sup>148</sup> The most significant structure is the relationship established between the Commission of the European Communities and the Interdepartmental Working Party of the Council of Europe. It is anticipated that this relationship can provide for a "regular comparison" of the activities of the two organizations.<sup>149</sup>

However, structural differences in the two organizations may still prove problematic. The Council of Europe pursues its objectives largely through conventions and recommendations. The Communities, on the other hand, emphasizes legislative actions. Disagreements over which methods to use when addressing particular problems may arise. The future of Western European cooperation in criminal matters will depend in part on the ability of the regime to accommodate these compet-

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145. See, e.g., Breitenmoser & Wilms, *Human Rights v. Extradition: the Soering Case*, 11 MICH. J. OF INT'L L. 845 (1990); Quigley, *Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia*, 30 VA. J. INT'L L. 241 (1990).

146. Current U.S. forfeiture laws may not be respected by Western Europe. Nilsson and Zagaris, A.B.A. National Institute Considers International and Foreign Law Aspects of Asset Forfeiture 435, 437, (Dec. 1990).

147. See *supra* note 62 and accompanying text.

148. See Commission of the European Communities, *supra* note 142.

149. *Id.* at 4.

ing approaches to cooperation. In this regard, the flexible nature of regimes and the current spirit of cooperation between the two organizations provide a basis for optimism.